

STATUTORY DEMANDS: PAY UP OR WIND UP

There is little scope for error for creditors or company debtors where Statutory Demands are concerned. The consequences for failure to comply with a demand are harsh. The Courts are unforgiving and a failure to properly issue a demand can be expensive.

A statutory demand notice is a formal, attested demand issued under section 459E of the Corporations Act 2001. It is a very effective debt recovery tool for debts owed by companies if used properly. If such a demand is correctly issued and served and the debtor company fails to pay the debt within 21 days from the date of service of the demand, or otherwise fails to make arrangements to pay the debt to the creditor's satisfaction, the company is presumed "insolvent" and the creditor can make an application to wind the company up.

Issuing a Statutory Demand

Issuing a statutory demand is one of the quickest and least expensive avenues of recovering money owed to you by corporate debtors. It is also one of the most effective ways of enforcing a judgment of the Courts if the judgment debtor is a company.

In what circumstances can you issue a Statutory Demand?

A statutory demand can only be issued to a corporate debtor if:

- the debt or debts owed total more than \$2,000; and
- there is no genuine dispute about the existence of the debt or debts. (If the debt is a judgment debt, there is an automatic presumption that there is no dispute as to the existence of the debt).

If a creditor issues a demand that fails to meet these tests, the demand will fail.

Importance of Getting the Statutory Demand Right

The Courts have held that creditors who use statutory demands must ensure the demand is expressed in clear, correct and unambiguous terms. The Corporations Act 2001 places strict requirements on the form and wording of the demand and the methods of service.

MARK LOVE, PARTNER

Mark Love is a founding partner of Williams Love & Nicol and a NSW Law Society accredited specialist in business law. Mark leads the Williams Love & Nicol commercial team, and is an experienced practitioner in the area of corporate insolvency, intellectual property and corporate governance. Mark also has a wealth of experience providing general legal and strategic business advice to a diverse array of businesses, including accountancy firms, software developers and government agencies.

JOHN LARKINGS, SENIOR ASSOCIATE

John has considerable experience in relation to insolvency and the conduct of corporate and commercial litigation. He acts for several Canberra-based businesses and liquidators in commercial disputes and the liquidation of companies.

KATIE INNES, SOLICITOR

Katie's practice includes advising consumers and businesses on trade practices law in both the public and private sector. She has considerable experience advising on government regulation under the Corporations Act, the Bankruptcy Act and the Trade Practices Act. Katie also advises on a broad range of commercial issues including bankruptcy and insolvency, directors' duties, company restructure and trademark applications.



CONTACT

Mark Love

T +61 2 6263 9900

E mark.love@wln.com.au

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If the demand is confusing, does not correctly identify the creditor, the debtor or the debt outstanding, the creditor risks having a Court set aside the demand.

If a statutory demand is set aside the creditor will not gain the benefit of presumed insolvency and the creditor is likely to bear liability for the debtor's costs in that application.

A creditor should consider the following before issuing a statutory demand:

- if the debtor company fails to comply with the statutory demand this does not enhance the creditor's rights to enforce the debt - liability to pay the debt must still be proved;
- if the debtor company applies to have the statutory demand set aside and succeeds – the debtor company can recover its legal costs from the creditor; and
- if the debtor company complies with the statutory demand, pays the monies outstanding, but then enters into liquidation within 6 months of making the payment to the creditor – the payment may be considered an unfair preference and the creditor may be required to return the money. The issue of the statutory demand by the creditor tends to be evidence that the creditor had grounds to suspect that the debtor company was insolvent.

RECEIVING A STATUTORY DEMAND

Statutory demands must be served upon the debtor company in accordance with s109X of the *Corporations Act 2001*. This merely requires leaving it at or posting it to the company's registered address or delivering a copy of the document personally to a director of the company.

These methods of service place a responsibility on directors as well as the true occupiers of the registered office, which typically might be the company's accountants, financial advisers or lawyers, to take action in response to the statutory demand immediately.

For these reasons, having a domestic residence as a company's registered office is inadvisable, as absence or failure to deal with mail for periods of weeks is not uncommon.

The worst thing you can do in relation to a statutory demand is to ignore it.

Importance of Acting Immediately

A debtor company has 21 days from the date of service of the demand to either pay the money owed or to make an application to set aside the statutory demand.

This time frame is strictly enforced by the courts.

A creditor is entitled to assume that the debtor company has been served 4 days after the date on which they posted the demand. Debtor companies cannot get an extension of time.

A delay of even one day may mean that the debtor company cannot set aside the demand and then, in response to an application to have the debtor company wound up, the company must bring sufficient evidence before a Court to prove that the company is in fact solvent – the issue before the Court is no longer the debt on which the demand was issued, but the solvency of the company.

Time, then, is of the essence. In *Challenge Home Loans v Etienne Lawyers* [2007] NSWSC 1145 there was a factual dispute as to the day on which the demand was served. The Court held that the demand had actually been served one day prior to the day the debtor company had thought and as such their application to set aside the demand failed.

If the demand is disputed, a debtor company can attempt to negotiate with the creditor to unconditionally withdraw the demand but the debtor company should also instruct solicitors and prepare both the application to set aside the demand and the affidavit material to dispute the debt in the event negotiations fail; those materials must be filed and served within the 21 day period.

To be clear, we repeat: an application to set aside the demand including the affidavit material to be relied upon must be filed and served upon the creditor within the 21 day period.

Consequences of failure to act

If a debtor company fails to comply with a statutory demand or have the demand set aside, a presumption can be made that the debtor company is insolvent (s459C(2)). A creditor can then use this presumption of insolvency to apply to the Court to have the debtor company wound up.

**IF YOU RECEIVE A
STATUTORY
DEMAND ALWAYS
ACT IMMEDIATELY**

Williams Love & Nicol Lawyers can provide advice on your rights as a creditor or debtor, the use of the statutory demand process and can represent you in an appropriate application to set aside a statutory demand. Please be aware that strict time limits apply in such matters.

This information brochure is for general information only and should not be relied upon in the absence of specialised legal advice. If your company has been served with a statutory demand you should seek legal advice in relation to your options immediately.